IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY & MACRAE
One Chase Manhattan Plaza
New York, New York 10005
Attorney for
Edison Electric Institute

Of Counsel:

HARRY H. VOIGT
HENRY V. NICKEL
EDWARD L. COHEN
LEBOEUF, LAMB, LEIBY & MACRAE
1757 N Street, N. W.
Washington, D. C. 20036

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
INTEREST OF AMICUS CURIAE	1
BACKGROUND	4
ARGUMENT	10
I. Section 110(f) of the Act does not restrict the authority of the States to revise their implementation plans in accordance with section 110(a) of the Act	11
II. Recent amendments to the Clean Air Act compel the rejection of the interpretation of the court below	19
III. The interpretation of the court below may jeopardize attainment of primary standards and is not in the public interest	21
CONCLUSION	26

CITATIONS

CASES:

Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973) 10
Boyden v. Comm'r of Patents, 441 F.2d 1041, 1043 n.3 13
Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973) 10, 22, 23
Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974) 9, 10
Duquesne Light Co. v. EPA, 481 F.2d 1 (3rd Cir. 1973) 10, 22
Escoe v. Zerbst, 295 U.S. 490, 493 (1935) 13
Natural Resources Defense Council v. EPA, 478 F.2d 875 (1st Cir. 1973) 10, 11
Natural Resources Defense Council v. EPA, 483 F.2d 690 (8th Cir. 1973) 10, 11
Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974) 2, 8, 10, 11, 14, 15, 16, 19, 21

Page

Natural Resources Defense Council v. EPA, 494 F.2d 519 (2d Cir. 1974) 10, 11
United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972) 10, 22
WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) 10

STATUTES:

Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) 2

Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), *as amended*, Pub. L. No. 93-319, 88 Stat. 246 (1974) .. 2

§ 107, 42 U.S.C. § 1857c-2 (1970) 5
§ 109(a)(1)(A), 42 U.S.C. § 1857c-4(a)(1)(A) (1970) 4
§ 109(b)(1), 42 U.S.C. § 1857c-4(b)(1) (1970) ..4, 12
§ 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970) ..4, 12
§ 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970) .. 5
§ 110(a)(2), 42 U.S.C. § 1857c-5(a)(2) (1970) .. 5, 6, 11, 13, 15, 19, 22, 23
§ 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970) 5, 12
§ 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B) (1970) 5, 17
§ 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3), *as amended*, Pub. L. No. 93-319, 88 Stat. 256 (1974) 6, 13, 14, 15, 16, 17, 18, 19, 20, 21
§ 110(a)(3)(B), Pub. L. No. 93-319, 88 Stat. 256 (1974) 6, 20
§ 110(c), 42 U.S.C. § 1857c-5(c) (1970) 5
§ 110(d), 42 U.S.C. § 1857c-5(d) (1970) 6, 14, 16
§ 110(f), 42 U.S.C. § 1857c-5(f) (1970) ..6, 7, 10, 11, 14, 15, 16, 17, 19, 21, 22, 24
§ 110(f)(1)(C), 42 U.S.C. § 1857c-5(f)(1)(C) (1970) 15
§ 113, 42 U.S.C. § 1857c-8 (1970) 14
§ 119, Pub. L. No. 93-319, 88 Stat. 248 (1974) ... 21
§ 202, 42 U.S.C. § 1857f-1 (1970) 21, 22
§ 302(h), 42 U.S.C. § 1857h(h) (1970) 12
§ 304, 42 U.S.C. § 1857h-2 (1970) 14

Energy Supply and Environmental Coordination Act, Pub. L. No. 93-319, 88 Stat. 246 *et seq.* (1974) ..6, 20, 21

Page

MISCELLANEOUS:

116 CONG. REC. 32918 (1970) 8
116 CONG. REC. 32901-02 (1970) 12
116 CONG. REC. 19200, 19204, 19205, 19206, 19207, 19209, 32918, 33116, 42382, 42384 (1970) 12
116 CONG. REC. 19205 12
116 CONG. REC. 42384 (1970) 12, 15
116 CONG. REC. 19205, 19207, 32903 (1970) 18
116 CONG. REC. 42386 (1970) 18
S. REP. No. 91-1196, 91st Cong. 2d Sess. 9-10, 11 (1970) 12
H. REP. No. 91-1783, 91st Cong. 2d Sess. 45 (1970) ...12, 15
H. REP. No. 93-710, 93rd Cong. 1st Sess. 43 (1973) 20
H. REP. No. 93-1085, 93rd Cong. 2d Sess. 40 (1974) 20
40 C.F.R. Part 50 (1973) 4
40 C.F.R. § 51.2(b) (1973) 7
40 C.F.R. § 51.2(g) (1973) 7, 17
40 C.F.R. § 51.15 (1973) 18
40 C.F.R. § 51.32(f) (1973) 7
36 Fed. Reg. 8186 (1971) 4
36 Fed. Reg. 15486 *et seq.* (1971) 7, 8
37 Fed. Reg. 10842 *et seq.* (1972) 8, 9, 23
37 Fed. Reg. 11826 (1972) 8
38 Fed. Reg. 22736 (1973) 19, 24
38 Fed. Reg. 23339 (1973) 23
38 Fed. Reg. 32577 (1973) 23
39 Fed. Reg. 15137 (1974) 23
39 Fed. Reg. 16344 (1974) 9

D.C. RULES AND REGULATIONS §§ 8-2:704, 705, 706, 708, 710, 731 ..... 9, 22
MICH. ADMIN. CODE R336.49 9
GEN. LAWS R.I. § 23-25-15 9
IOWA CODE ANN. § 136B.13 9
GA. CODE ANN. § 88-912 9
Hearing Examiners' Report and Recommendations, *In re* Consolidated Electric Utility Cases, No. 73-A-P-120 (Ohio EPA, Sept. 6, 1974) 22
SUTHERLAND & JABEZ, STATUTES AND STATUTORY CONSTRUCTION § 2803 (3d ed. 1943) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, Administrator, United States Environmental Protection Agency and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., SAVE AMERICA'S VITAL ENVIRONMENT, JANEY WEBER, SUSANNE ALLSTROM, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

In compliance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for the parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 198 companies that supply elec-

tricity to 77.6 percent of all the electric service customers in the United States. EEI submits this brief in support of reversal of the Fifth Circuit's decision in this case.[1]

Member companies of EEI operate some 1800 steam-electric generating plants that are subject to regulation under the Clean Air Act ("the Act") [2] and the State implementation plans adopted under the Act. Those implementation plans were initially drawn up under a statutory deadline that did not permit the accumulation and evaluation of all necessary data. Accordingly, many State plans contained limitations and deadlines that were concededly arbitrary. Since both the Act and EPA regulations gave ample latitude for plan revisions, this was not considered to be detrimental where the States included procedures to revise their plans as more data became available. Under the decision below, however, such revisions are virtually ruled out.

Under the approach taken by the Fifth Circuit, plants operated by EEI member companies may be required to comply with limitations or deadlines that are wholly unrealistic and unnecessary to achieve and maintain primary and secondary ambient air quality standards under the Act. Electric rates to the consumer have already increased dramatically as a result of inflation and soaring fuel costs. Rate increases are being sought throughout the country to finance new construction of facilities that are needed to meet future energy demands. No additional costs should be imposed on the industry and the consumer to meet pollution control requirements that go beyond those needed to protect the public health and welfare from adverse effects. The States should retain maximum flexibility, consistent with the provisions of the Act relating to implementation plans, to adjust such requirements in a realistic fashion.

Another effect of the decision below may be to force EEI member companies to use less coal and more oil or to switch from high-sulfur to low-sulfur fuels. If the States are forbidden to revise their implementation plans to permit the use of fuel on an optimum basis, the Nation's current dependence upon imported oil will only be exacerbated, and the directive of the Clean Air Act that the States achieve a level of air quality necessary to protect the public health by mid-1975 may be jeopardized.

It may be thought that the question before this Court is too narrow to evoke the concern of EEI. Since the mid-1975 deadline for compliance with National primary ambient air quality standards under the Clean Air Act is rapidly approaching, a limit on the authority of the States to grant "pre-attainment" variances (subject, of course, to EPA approval as a revision to their implementation plans) may appear to have diminishing significance. However, the rationale of the Fifth Circuit would severely restrict the authority of the States not merely to grant such "pre-attainment"

---

[1] Natural Resources Defense Council v. EPA, 489 F.2d 390 (5th Cir. 1974). Hereinafter "Natural Resources Defense Council" will be referred to as "NRDC."

[2] 42 U.S.C. § 1857 *et seq.* (1970), *as amended*, Pub. L. No. 93-319, 88 Stat. 246 1974). For convenience, all references will be to the section numbers of the Clean Air Act rather than the United States Code; citations to both appear in the Table of Citations.

variances, but also to permit continued operation by many sources that are not interfering with primary standards. The broader implications of the decision below will continue to hamper the States long beyond 1975. Thus, the Fifth Circuit's decision is of considerable and continuing significance.

EEI urges that the decision of the lower court is neither required by the Act nor consonant with its purposes. Because of its broad impact, EEI believes that it is essential for this Court to reject the reasoning of the Fifth Circuit and reverse its holding restricting the authority of the States to adopt revisions of their air quality implementation plans.

BACKGROUND

On December 30, 1970, the Clean Air Amendments of 1970 became law.[3] Those amendments restructured the Clean Air Act and established a rigorous program for the control of air pollution through the establishment and implementation of Federal primary (health-related)[4] and secondary (welfare-related)[5] ambient air quality standards.

Under section 109 of the Act, as amended in 1970, the Administrator was to promulgate standards for five pollutants, including sulfur oxides, within 120 days of enactment.[6]

---

[3] Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[4] Clean Air Act § 109(b)(1).

[5] Clean Air Act § 109(b)(2).

[6] Clean Air Act § 109(a)(1)(A). Standards for six pollutants were promulgated by the Administrator on April 30, 1971. 36 Fed. Reg. 8186 (1971); 40 C.F.R. Part 50 (1973).

Section 110(a)(1) of the Act required each State to hold hearings on, adopt, and submit to the Administrator a plan which provides for implementation, maintenance, and enforcement of each Federal primary and secondary ambient air quality standard in each "air quality control region"[7] within the State.

The States were given nine months from the promulgation of standards to submit their plans. Section 110(a)(2) of the Act required the Administrator to "approve or disapprove" the plan within four months of submission. The Administrator was directed to approve the plan if it met eight specific statutory criteria. A plan to implement a primary standard was to provide "for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan . . . ."[8] A plan to implement a secondary standard was to specify a "reasonable time" for attainment of the secondary standard.[9] In addition, any plan was to include "emission limitations, schedules, and timetables for compliance with such limitations and such other measures *as may be necessary to assure the attainment and maintenance*" of Federal ambient air quality standards.[10]

If the Administrator disapproved the plan or any portion thereof, he was to promulgate regulations to cure the deficiency in the plan.[11] Following approval

---

[7] The entire geographical region of each State is divided into one or more "air quality control regions." Clean Air Act § 107.

[8] Clean Air Act § 110(a)(2)(A)(i).

[9] Clean Air Act § 110(a)(2)(A)(ii).

[10] Clean Air Act § 110(a)(2)(B) (emphasis added).

[11] Clean Air Act § 110(c).

or promulgation of a plan, section 110(a)(3) of the Act [12] directs the Administrator to approve any revision to a plan adopted by the State after reasonable notice and hearing that meets the requirements of section 110(a)(2). By necessary implication, so long as those requirements are met, a revision may relax, as well as tighten, specific provisions of a State implementation plan.

In addition, section 110(f) provides that "[p]rior to the date by which any source or class of sources is required to comply with any requirement of an applicable implementation plan" [13] the Governor of the State may apply to the Administrator "to postpone the applicability of such requirement . . . for not more than one year." To grant the postponement, the Administrator must find that:

a. good faith efforts have been made to comply;

b. necessary technology or alternative methods of control are not available or have not been available for a sufficient period of time;

c. any available alternative operating procedures and interim controls have reduced or will reduce the impact of the source on the public health; and

[12] Throughout this brief, reference is made to section 110(a)(3). Although the section was renumbered § 110(a)(3)(A) under Pub. L. No. 93-319, 88 Stat. 256 (1974), the original section reference is used for convenience. For discussion of § 110(a)(3)(B), see p. 20 *infra*.

[13] Clean Air Act § 110(d) defines "an applicable implementation plan" as "the implementation plan, *or most recent revision thereof*, which has been approved under subsection (a) or promulgated under subsection (c) *and which implements a national primary or secondary air quality standard within a state.*" (Emphasis added.)

d. continued operation is essential to the national security or public health and welfare.

Public notice is required, and, if requested, an adjudicatory hearing must be conducted before a section 110(f) postponement can be granted.

In August 1971 EPA established general guidelines for preparation, adoption and submission of State implementation plans.[14] EPA recognized that different sources would have different impacts on ambient levels of pollutants and that the ambient levels of pollutants would vary within a region. Accordingly, the guidelines provided that the States were not required "to adopt a control strategy uniformly applicable throughout a region unless there is no satisfactory alternative way of providing for attainment and maintenance of ambient standards throughout such region." [15] In addition, the guidelines emphasized that the States should not adopt a control strategy without considering the "cost effectiveness" and the "social or economic impact of a control strategy." [16] Finally, the regulations expressly stated that the States could revise their plans to relax requirements that proved to be more stringent than the Act required.[17]

The task facing the EPA and the States in August 1971 was staggering. Each region had to be monitored to determine whether and where ambient standards were being exceeded; all sources of pollution had to be inventoried; diffusion models had to be prepared

[14] 36 Fed. Reg 15486 (1971).

[15] 36 Fed. Reg. 15487 (1971); 40 C.F.R. § 51.2(g) (1973).

[16] 36 Fed. Reg. 15486, 15487 (1971); 40 C.F.R. § 51.2(b) (1973).

[17] 36 Fed. Reg. 15494 (1971); 40 C.F.R. § 51.32(f) (1973).

to determine what controls were required to attain the standards; the social and economic impact of alternative control strategies had to be evaluated; specific controls had to be defined; schedules had to be set to achieve compliance with those controls; hearings had to be held in each State; and EPA had to review the final product to determine whether it met the requirements of the Act.[18] All of these steps had to be completed in less than a year.

It was simply impossible for the States to perform all of the analyses required to develop a finely-tuned regulatory program within that first year. Monitoring data on source emissions and ambient concentrations of pollutants were incomplete; there was insufficient time to inventory sources and develop diffusion models to determine which sources were contributing to violations of standards; and detailed information was not available on the feasibility of, or time required for, compliance by each source with the controls proposed by the States.[19] Therefore, the States took a broad-

[18] *See generally* 116 CONG. REC. 32918 (1970) (remarks of Senator Cooper); NRDC v. EPA, 489 F.2d at 394; 36 Fed. Reg. 15486 (1971).

[19] The development of State plans to implement ambient air quality standards for nitrogen oxides provides a striking example of the imperfect nature of the plan development process. EPA's original monitoring data on nitrogen oxide concentrations disclosed violation of the standards in thirty-five States. As a result, EPA disapproved a number of State plans for their failure to impose rigid controls on nitrogen oxide emissions from stationary sources. 37 Fed. Reg. 10842 (1972). Following disapproval, EPA published proposed regulations for those plans that would have required costly modifications in existing facilities. *See, e.g.*, 37 Fed. Reg. 11826 (1972). Prior to promulgating any of these regulations, however, EPA completed a national study of nitrogen oxide ambient levels. This study showed that nitrogen oxide standards were being exceeded in only three air quality control regions in the entire country. As a result, the EPA disapproval notices and proposed regulations were withdrawn. 39 Fed. Reg. 16344 (1974).

brush approach in initially establishing control strategies. It was intended that those control strategies would be re-examined and refined later.

Most States set categorical emission limitations that applied throughout the State (or throughout a region).[20] In certain cases, those emission requirements were made effective immediately [21] while, in others, the requirements were to be effective on July 1, 1975, or some date before 1975. The States recognized, however, that such control strategies were more stringent than the Act required and therefore provided for case-by-case exceptions with the burden of proof on the source operator. Procedures were included in State plans to relax compliance dates, or even to exempt sources from the emission requirements in the plan, where compliance was not needed to attain or maintain ambient standards.[22] In addition, procedures were included to defer compliance where compliance was not technically or economically feasible.[23] Those procedures allowed the States to determine at a later date issues that could have been resolved when the plan was

[20] 37 Fed. Reg. 10843 (1972).

[21] *See, e.g.*, D.C. RULES & REGULATIONS §§ 8-2:704, 705, 706, 708, 710, 731.

[22] *See, e.g.*, MICH. ADMIN. CODE R336.49. *See also* Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974); 37 Fed. Reg. 10845-46 (1972).

[23] *See, e.g.*, GEN. LAWS R.I. § 23-25-15; IOWA CODE ANN. § 136B.13; GA. CODE ANN. § 88-912.

adopted had the States had time to develop more sophisticated control strategies in the first instance.[24]

ARGUMENT

The court below was one of four circuits to set aside the Administrator's approval of State "variance procedures" designed to provide relief from requirements in the State plan.[25] The other circuits focused on the impermissibility (except in compliance with section 110(f) of the Act) of extending compliance with requirements that were necessary to protect the public health (*i.e.*, requirements needed to attain primary standards) beyond mid-1975.[26] Each of those circuits recognized, however, that the States could revise their plans to change pre-1975 deadlines for compliance with such requirements upon a finding that compliance was

---

[24] The Administrator's approval of State plans was challenged in three circuits on the ground that to comply with the control strategy set forth in the plan was not technologically or economically feasible. Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3rd Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). Each circuit held that EPA must consider the technical and economic feasibility of compliance with a control strategy in determining whether to approve a State plan. Certainly, more petitions would have been filed had not the plans included "safety valve" procedures which established a mechanism for plan revision based on specific circumstances. *See Detroit Edison*, 469 F.2d 244 (6th Cir. 1974). *Cf.* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[25] NRDC v. EPA, 494 F.2d 519 (2d Cir. 1974); NRDC v. EPA, 489 F.2d 390 (5th Cir. 1974); NRDC v. EPA, 483 F.2d 690 (8th Cir. 1973); NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973).

[26] NRDC v. EPA, 494 F.2d at 523 (2d Cir. 1974); NRDC v. EPA, 483 F.2d at 693-94 (8th Cir. 1973); NRDC v. EPA, 478 F.2d at 887 (1st Cir. 1973).

not "practicable."[27] In contrast, the court below held that section 110(f) precluded any revision in State plans to change the date by which a source was required to comply with an approved emission limitation.[28]

Under the Fifth Circuit holding, compliance dates in the plans originally approved by the Administrator are fixed in concrete and cannot be changed even though compliance is "impracticable" or "unreasonable" or wholly unnecessary to attain and maintain ambient standards. The only relief available to the States and source operators is a "one-year postponement" under section 110(f). This is an unwarranted restriction on the authority of the States to revise their implementation plans when new evidence shows that a requirement in a plan is more stringent than the Act demands. This Court should reject the rationale of the court below that the States are precluded from adopting proposed revisions that would extend compliance deadlines in a manner consistent with section 110(a)(2) of the Act.

I.

Section 110(f) of the Act does not restrict the authority of the States to revise their implementation plans in accordance with section 110(a) of the Act.

Both the language of section 110 of the Clean Air Act and its legislative history compel rejection of the holding below that Congress intended section 110(f) to preclude the States from revising State implementation plans to change compliance deadlines.

Under the Clean Air Act, primary standards must protect the "public health" with an "adequate margin

---

[27] *Id.*

[28] 489 F.2d at 401-03.

of safety" from the adverse effects of pollution.[29] Accordingly, in section 110(a), Congress directed that those standards be attained as expeditiously as practicable but not later than a fixed deadline.[30] Secondary standards, on the other hand, protect the "public welfare" against "any known or anticipated adverse effects" of pollution.[31] Because social, economic, or technological considerations may dictate delaying attainment of those standards, Congress provided that they be met within a "reasonable" time.[32] Primary and secondary standards together provide the degree of protection needed to avoid virtually any adverse effect from pollution. Thus, Congress only required the States to impose controls that are necessary to attain and maintain ambient standards.[33] Congress

[29] Clean Air Act § 109(b)(1). *See* S. REP. No. 91-1196, 91st Cong. 2d Sess. 9-10 (1970).

[30] Clean Air Act § 110(a)(2)(A)(i). *See* 116 CONG. REC. 32901-02 (1970) (remarks of Senator Muskie).

[31] Clean Air Act § 109(b)(2). The "effects on welfare" are defined to include "effects on soil, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and wellbeing." Clean Air Act § 302(h). *See* S. REP. No. 91-1196, *supra* note 29, at 11.

[32] Clean Air Act § 110(a)(2)(A)(ii). *See* H. REP. No. 91-1783, 91st Cong. 2d Sess. 45 (1970). 116 CONG. REC. 42384 (1970).

[33] Throughout the debates, State implementation plans were discussed exclusively in the context of attainment and maintenance of ambient air quality standards. 116 CONG. REC. 19200, 19204, 19205, 19206, 19207, 19209, 32918, 33116, 42382, 42384 (1970). Establishing more stringent controls was left to the discretion of the States: "[W]e say that all the states must comply with nationwide standards. *We think this is the best we can do. If any state wants stronger standards, we think it will know best what it should do or how far it should go.*" *Id.* at 19205 (remarks of Mr. Staggers) (emphasis added).

recognized that, as new information became available, the requirements of plans originally adopted by the States might prove to be more, or less, stringent than the Act required. As a result, the Act provides that States may revise their plans.[34]

In mandatory terms, section 110(a)(3) of the Act provides that the Administrator "*shall approve any revision of an implementation plan*" if it meets the requirements of section 110(a)(2) and was adopted after reasonable notice and public hearing.[35] Thus, the Act clearly authorizes the States to make "mid-course" corrections in their plans. Applying the criteria of section 110(a)(2), where compliance with a primary standards requirement is not "practicable," a plan may be revised to extend compliance up to the mandatory attainment date for primary standards. Similarly, where primary standards have been or will be achieved by the statutory deadline, a plan may be revised to extend compliance with any secondary standards requirement if compliance is not "reasonable." Finally, where compliance is not required to achieve either primary or secondary standards, a plan may be revised to extend compliance so long as the extension will not interfere with the maintenance of those standards. A source owner is not relieved from compliance with the original plan, of course, until the Administrator approves the revision submitted by the State

[34] Clean Air Act § 110(a)(3).

[35] The word "shall" indicates a mandatory intent. "Shall" is the language of command. *See* Escoe v. Zerbst, 295 U.S. 490, 493 (1935). *See also* Boyden v. Comm'r of Patents, 441 F.2d 1041, 1043 n.3 (D.C. Cir. 1971); SUTHERLAND & JABEZ, STATUTES AND STATUTORY CONSTRUCTION § 2803 (3d ed. 1943).

and, by that action, changes the implementation plan itself.[36]

Section 110(a)(3), which allows the States to make revisions to plans, is not inconsistent with section 110(f), which allows the States to request a one-year postponement in the "applicability" of a plan requirement.

Under the Act, once an implementation plan is approved by the Administrator, the requirements in that plan have the force of law and must be complied with unless and until that plan is changed to include different requirements. Section 110(f) establishes a limited exception to this general rule under which the "applicability" of an effective plan requirement may be postponed if certain rigid criteria are met.[37] In this sense, the Court below was correct in stating that section 110(f) is "the exclusive mechanism for granting *variances from requirements of state implementation plans.*"[38] Since section 110(f) does not change the plan itself, it is proper to characterize the relief as a limited "variance" from the plan requirements. It does not follow, however, that the States may not change the compliance dates of their plans under section 110(a)(3) to establish *new plan requirements.*[39]

[36] Under sections 113 (Federal Enforcement) and 304 (Citizens' Suits) of the Act, an enforcement action may be brought in Federal District Court for violation of any requirement in an applicable implementation plan. Changes in implementation plan requirements are not effective until they are approved by the Administrator as a revision to the plan. *See* Clean Air Act § 110(a)(3) and (d).

[37] Pp. 6-7 *supra.*

[38] 489 F.2d at 399.

[39] *Id.* at 401.

Where an existing plan is more stringent than the Act requires, a State has two choices: It may either seek a change in the plan requirement pursuant to section 110(a)(3) or it may request a one-year postponement in the plan requirement pursuant to section 110(f). Where the plan itself cannot be revised because a change would be inconsistent with the requirements of section 110(a)(2), a postponement under section 110(f) is the only relief available. Since postponement requests would usually be made where the delay would jeopardize attainment of primary standards by the statutory deadline, it is understandable that Congress set stringent criteria to restrict the use of section 110(f).[40]

The language of section 110(f) does not limit the authority of the States to adopt, or the duty of the Administrator to approve, any revision in a plan that satisfies the requirements of section 110(a)(2).

The court below held that the reference in section 110(f) to "*any* stationary source" and "*any* requirement of an applicable implementation plan . . . lends no basis for [a] construction" that would allow plan revisions that relax compliance dates.[41] However, while the Fifth Circuit was concentrating on the word "*any*", it was ignoring the statutory definition of "an

[40] The very structure of section 110(f) presumes a situation where primary standards are being violated. For example, the Administrator must find that "any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health . . . ." Clean Air Act § 110(f)(1)(C). The meager legislative history of the section discloses that it was adopted in the context of extensions in attainment of primary standards. H. REP. No. 91-1783, *supra* note 32, at 45; 116 CONG. REC. 42384 (1970).

[41] 489 F.2d at 401 (emphasis in original).

applicable implementation plan." When that definition is considered, it is clear that the lower court was mistaken in concluding that plans cannot be revised to change compliance dates.

Section 110(d) defines "an applicable implementation plan" as "the implementation plan, or *most recent revision thereof,* which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard within a state." Thus, the phrase "any requirement of *an applicable implementation plan"* does not limit the authority of the States and EPA to revise a plan. To the contrary, an "applicable implementation plan" expressly includes its "most recent revision . . . approved under subsection (a) . . . ."

The court below attempted to justify its interpretation of section 110 by asserting that "the procedures of section . . . [110](f) were to apply to *all* particular changes and those of section . . . [110](a)(3) to changes in rules of general application."[42] This unsupported assertion is then followed by a statement that "[t]here is no reason to believe that Congress intended some, indeed most, changes of a particular character should be deemed 'revisions' . . . ."[43] The Fifth Circuit's holding that the States cannot make "source specific" changes in their plans under section 110(a)(3) is without foundation.

---

[42] *Id.*

[43] *Id. But see* note 55 *infra.*

First, the rationale of the Fifth Circuit is based on the assumption that section 110(f) establishes a procedure for "particular *changes."* As mentioned above, however, section 110(f) does not establish a procedure to "change" a plan; it establishes a procedure to postpone the "application" of an existing plan requirement. Thus, the conclusion that section 110(f) somehow limits the type of "changes" a State may adopt under section 110(a)(3) is premised on a false assumption.

Second, while section 110(a)(3) applies to "changes in rules of general application," there is nothing in the language of the Act to suggest that those changes cannot be of a "particular character." As mentioned above, the Act only requires the States to set limitations that are "necessary for the attainment and maintenance" of ambient standards.[44] EPA's regulations relating to implementation plans provide that the States are not required to establish "a control strategy uniformly applicable throughout a region *unless there is no satisfactory alternative way of providing for attainment and maintenance of ambient standards throughout such region."*[45] Thus, both the Act and the regulations provide for the development of sophisticated control strategies under which different sources would meet different requirements, depending upon the impact of the source on ambient standards. Furthermore, section 110(a)(2)(B) requires that plans include "schedules and timetables for compliance" with emission limitations. The time required for a particular source to comply with an emission limita-

---

[44] Note 33 *supra.*

[45] 40 C.F.R. § 51.2(g) (1973).

tion will vary. Thus, this section requires (as do EPA regulations)[46] that plans include source specific compliance schedules and deadlines that are consistent with the statutory directives regarding attainment of ambient standards. Since the Act envisages that State plans include control strategies and schedules of a "particular character," it cannot be inferred that section 110(a)(3) precludes the States from adopting revisions of a "particular character."

Finally, the interpretation of the Fifth Circuit is inconsistent with the legislative history of section 110. That legislative history is replete with statements emphasizing the broad discretion given the States under section 110.[47] As Senator Muskie stated during the final debates:

> [D]uring the deliberations on the bill I have been very much interested in preserving "local option" features, so that State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs. In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution.[48]

If a State may only make "general" changes in its plan under section 110(a)(3), it must either relax requirements for all sources in a region or not revise the plan, even though a revision is needed for only

[46] 40 C.F.R. § 51.15 (1973).

[47] *See, e.g.*, 116 Cong. Rec. 19205, 19207, 32903 (1970).

[48] 116 Cong. Rec. 42386 (1970).

one source. Similarly, where only one source is creating a pollution problem, a State would be required to impose new and stringent requirements on all sources. Certainly, such a result does not allow the States to select the means of controlling pollution "that is most responsive to their air pollution problem and most responsive to their needs."

II.

Recent amendments to the Clean Air Act compel the rejection of the interpretation of the court below.

EPA has consistently interpreted section 110(a)(3) of the Act to allow the relaxation of compliance dates for individual sources through revisions to State implementation plans.[49] Predicated on this interpretation of the Act, EPA, in December 1972, formulated its "clean fuels policy" under which States were encouraged to adopt source specific revisions to their plans in a manner consistent with section 110(a)(2). On August 23, 1973, EPA reiterated its policy:

> States are encouraged again to consider the alternatives available to them within the framework of the Clean Air Act. Modification of unnecessarily restrictive emission regulations, *relaxation of final compliance dates for sources which need not be controlled to meet the primary standards,* and requests for postponements under section 110(f) are all mechanisms to alleviate the short-term fuels problem.[50]

The Fifth Circuit rejected EPA's interpretation of section 110(a)(3) and, as a result, rejected an important element of the Agency's clean fuels policy.

[49] 489 F.2d at 400-01.

[50] 38 Fed. Reg. 22736 (1973) (emphasis added). *See* pp. 23-24 *supra.*

Subsequent to the Fifth Circuit decision, Congress enacted the Energy Supply and Environmental Coordination Act of 1974 to deal with the national energy crisis.[51] Among other things, that statute amended section 110(a)(3) by adding a new subsection. The new subsection requires the Administrator to take affirmative steps to implement EPA's clean fuels policy by assisting the State to identify unnecessarily restrictive plan requirements.[52] Under section 110(a)(3)(B) of the Act, as amended, the Administrator is required to review each State plan and report to the State "whether . . . such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any ambient air quality standard within the period permitted in this section." [53]

---

[51] Pub. L. No. 93-319, 88 Stat. 246 (1974).

[52] Clean Air Act § 110(a)(3)(B), Pub. L. No. 93-319, 88 Stat. 256 (1974). The Conference Report states that the intent of this provision is "to permit a mechanism by which EPA's clean fuels policy can be implemented to the extent that States agree to do so and by which conversions to the burning of coal can be effectuated more readily consistent with requirements of the Clean Air Act." H. REP. No. 93-1085, 93rd Cong. 2d Sess. 40 (1974).

[53] An earlier version of the Act would have given the Administrator even broader responsibilities and powers. The bill reported by the House Committee on Interstate and Foreign Commerce in December 1973 would have required the Administrator, not only to review State plans, but to "disapprove State plans . . . which are economically or technologically infeasible . . . ." H. REP. No. 93-710, 93rd Cong. 1st Sess. 43 (1973).

The Energy Supply and Environmental Coordination Act also amends the Clean Air Act to give the Administrator limited authority to suspend certain requirements in State implementation plans without the prior consent of the States. Clean Air Act § 119,

Thus, by its amendment, Congress has affirmed EPA's interpretation of section 110(a)(3) and has rejected the interpretation proffered by the Fifth Circuit.

III.

The interpretation of the court below may jeopardize attainment of primary standards and is not in the public interest.

The decision of the court below in effect penalizes the States for initially adopting plans that were more stringent than necessary to meet primary standards by the statutory deadline or were more stringent than necessary to achieve secondary standards within a "reasonable time." [54] It is improper to assume, as the Fifth Circuit did, that Congress intended States to ignore changed circumstances or new information and be bound forever by decisions made in early 1972. Such an assumption has no support in the legislative history of the Act [55] and ignores the reality of implementation

---

Pub. L. No. 93-319, 88 Stat. 248 (1974). Such authority is new. Under the Act as passed in 1970, the Administrator did not have authority to relax implementation plan requirements on his own initiative; the States either had to request a revision under section 110(a)(3) or request a one-year postponement under section 110(f).

[54] Certainly, such a result is not in the public interest and may encourage a far more cautious approach on the part of the States in the future.

[55] *See* notes 33, 47 & 48 *supra*. To support its interpretation, the Fifth Circuit relied on statements from the legislative history relating to the importance of meeting controls necessary to protect the "health of persons" by a fixed deadline. 489 F.2d at 401. Such statements do not, however, provide any support for the proposition that the States cannot relax requirements that prove to be *more stringent* than is necessary to achieve primary standards by the statutory deadline. The court also relied on the legislative history of section 202 of the Act. *Id.* That Congress intended that technology in the automobile industry "catch up with" the auto-

plan development.[56] Moreover, the Act should not be interpreted in a way that would jeopardize attainment of primary standards by the statutory deadline. That, however, may be the result if the interpretation of the Fifth Circuit is accepted by this Court.

As discussed above, when the States adopted their plans, they lacked the time and resources to develop sophisticated control strategies. As a result, many States adopted uniform control strategies to assure that any source contributing to violations of primary standards would reduce its emissions to attain those standards. These State plans, as applied to many

mobile "*emission* standards" under section 202 is irrelevant to the authority of the States to relax requirements relating to *ambient* standards under section 110 of the Act.

Moreover, as this Court stated in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972): "It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures to allow for special circumstances." An interpretation of the Act that allows plan revisions whenever the requirements of section 110(a)(2) are met is consistent with this principle. The Fifth Circuit's interpretation is not. Even the limited relief provided by section 110(f) may not be available where, for example, a plan requirement was immediately effective. Under section 110(f), the Governor of a State must request a postponement "[*p*]*rior to the date on which any stationary source . . . is required to comply* with any requirement of an applicable implementation plan." (Emphasis added.)

[56] *Cf.* Duquesne Light Co. v. EPA, 481 F.2d 1, 9 (3rd Cir. 1973). Following the remand in Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), the Ohio Environmental Protection Agency held extensive hearings on the limitations in the Ohio plan. The Hearing Examiners found that many of those limitations were both unnecessary and unreasonable and recommended significant changes in the Ohio plan. Hearing Examiners' Report and Recommendations, *In re* Consolidated Electric Utility Cases, No. 73-A-P-120 (Ohio EPA, Sept. 6, 1974).

sources within the State, were more stringent than the Act required. However, the Act and EPA's regulations provided for future changes in plans, and the States included procedures under which unnecessary or unreasonable requirements could be relaxed.[57]

When EPA approved State plans in May 1972, it was recognized that it might not be possible for all sources to meet the sulfur oxide requirements and deadlines that were included in most State plans.[58] With the advent of the energy crisis, many owners of sources that had planned to comply with State plans through conversions to low sulfur fuels found that they could not use such fuels.[59] Thus, compliance with deadlines that might have been reasonable when plans were adopted became impossible since those deadlines were predicated on abundant low sulfur fuel resources.

EPA soon realized that, if the sulfur oxide requirements in State plans were not changed, primary standards might not be attained by the statutory deadline. Scarce fuels and pollution control equipment were needed by sources in areas where those standards were being exceeded. Thus, EPA began actively encouraging

[57] Text pp. 8-10 *supra*.

[58] 37 Fed. Reg. 10843-44 (1972). It should be noted that EPA did not consider the technical or economic feasibility of compliance with plan requirements when it approved State plans in May 1972. *See, e.g., Buckeye Power*, 481 F.2d at 168-69.

[59] On August 29, 1973, the Energy Policy Office published proposed regulations to prohibit sources from converting to low sulfur fuels except where necessary to attain primary standards. 38 Fed. Reg. 23339 (1973). These regulations were promulgated on November 27, 1973. 38 Fed. Reg. 32577 (1973). When the Federal Energy Office was created, these regulations were re-promulgated. 39 Fed. Reg. 15137 (1974).

the States to revise their plans to defer compliance with emission controls that were more stringent than required under section 110(a)(2) of the Act. The following statement appearing in the August 23, 1973, *Federal Register* is representative of EPA's "clean fuels policy."

> [I]t is apparent that there is not enough low sulfur coal and stack gas cleaning equipment available to meet the regulations in all areas of all States in 1975. In recognition of this, the Administrator, on December 18, 1972, in a letter to the governors of the States in the areas where this fuels deficit exists, recommended that the States consider deferral of the effective dates of regulations affecting coal-burning sources of sulfur oxides where such deferral can be made without affecting attainment of the primary standards by the date required by the Act. Analysis shows that if this is done, adequate fuels and control equipment will be available for meeting all regulations necessary for attainment of the national primary ambient air quality standards by mid-1975. . . .
>
> States are encouraged again to consider the alternatives available to them within the framework of the Clean Air Act. Modification of unnecessarily restrictive emission regulations, relaxation of final compliance dates for sources which need not be controlled to meet the primary standards, and requests for postponements under section 110(f) are all mechanisms to alleviate the short-term fuels problem.[60]

At the time that State "variance" procedures achieved critical importance both from the standpoint of meeting the objectives of the Clean Air Act and

[60] 38 Fed. Reg. 22736 (1973).

from the standpoint of our national energy policy, the Fifth Circuit held that the States were precluded from using those procedures to adopt proposed revisions to their plans. Developments since that decision underline the need for flexibility in the administration of air quality controls and rejection of the Fifth Circuit holding.

First, it is now clear that fuel resources must be allocated to reduce the Nation's dependence on imported oil. Where American coal can be burned instead of foreign oil, without jeopardy to the public health, air quality regulations should be capable of ready adjustment to promote the use of domestic energy resources.

Second, it is now recognized that the availability of pollution-control equipment is limited. What is available should be channeled by regulation to those specific sources or areas where it is most needed, free of artificial requirements for uniform regulation.

Third, the capital-intensive utility industry is currently faced with a financial crisis: The inability to raise needed capital in a depressed market. To the extent that capital funds can be raised at all, they should be spent on pollution control that is acutely needed or on construction of generating facilities required to meet future energy demands.

Confirmation by this Court of the authority of the individual States to change plan requirements on a case-by-case basis will help insure that scarce economic and energy resources are used in a manner consistent with the public interest.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fifth Circuit.

Respectfully submitted,

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY & MACRAE
One Chase Manhattan Plaza
New York, New York 10005

Attorney for
Edison Electric Institute

Of Counsel:

HARRY H. VOIGT
HENRY V. NICKEL
EDWARD L. COHEN
LEBOEUF, LAMB, LEIBY & MACRAE
1757 N Street, N. W.
Washington, D. C. 20036